85-911 (1)

No.

Supreme Court, U.S.
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CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLES MARTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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47

QUESTIONS PRESENTED

Did the District Court err in not granting petitioner's motion for new trial made on the ground that prosecutorial misconduct was so prejudicial as to violate petitioner's right to effective assistance of counsel?

Did the District Court err in not granting petitioner's motion for new trial made on the ground of the prosecution's failure to disclose to petitioner exculpatory material even after a specific request had been made?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the United States of America and seven defendants, one of whom is petitioner here:

1. Charles Marty, Petitioner
2. Jim Pettit
3. Anthony Gerbino
4. James Cannin
5. James Boy
6. Thomas Anderson
7. Armando Evora

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLES MARTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Charles Marty hereby petitions that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on July 17, 1985.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on July 17, 1985 (No. 84-5037). The opinion, which is contained in the Appendix at page 1, is not reported. Petitioner was convicted on a jury verdict, and the District Court did not enter an opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 17, 1985 affirming petitioner's conviction and sentence entered by the United States District Court for the Southern District of Florida on January 13, 1984. Petitioner's Motion for Rehearing was denied by the

United States Court of Appeals for the Eleventh Circuit on August 28, 1985. This petition is being filed beyond the 60 days specified by Rule 20 of the Rules of the Supreme Court because petitioner did not retain present counsel until November 21, 1985. Immediately upon being retained, counsel began research, review of the record and preparation of this petition. Therefore, petitioner prays that this Court consider his petition.

The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

Section 841(a)(1) of 21 U.S.C. provides:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"

Section 952(a) of 21 U.S.C. provides

"(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that-
(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States-

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium."

Section 960 (a)(1) of 21 U.S.C. provides:

"(a) Any person who-

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance shall be punished as provided in subsection (b) of this section."

Disciplinary Rule 7-104(A)(1) of the American Bar Association Code of Professional Responsibility, provides:

"(A) During the course of his representation of a client, a lawyer shall not:

(1) Communicate or cause another to

communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

STATEMENT OF THE CASE

A. Course of Proceedings in the Court Below

On March 17, 1983 petitioner was indicted along with 26 other persons by a Grand Jury of the United States District Court for the Southern District of Florida. Although the indictment contained six counts, petitioner was named only in Counts I and II. Count I alleged conspiracy to possess marijuana and cocaine with intent to districute, in violation of 21 U.S.C. 841(a)(1). Count II alleged conspiracy to import marijuana and cocaine

in violation of 21 U.S.C. 952(a) and 960 (a)(1). On April 29, 1983 petitioner entered a plea of not guilty to the charges. (Record on Appeal, p.4).

The conduct of the pre-trial proceedings in the District Court was subject to that court's Standing Discovery Order, entered April 18, 1983, which provides that

> "The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of Brady v. Maryland, 373 U.S. 83 (1963)."
>
> R118

Trial by jury for petitioner and eight co-defendants began on November 7, 1983. The other co-defendants either had entered into plea agreements with the government or were still at large. (Trial Transcript, Vol I, p. 1).

On November 22, 1983 petitioner made a specific request for exculpatory material properly available to him under the doctrine of Brady v. Maryland, supra, and the District Court's Standing Discovery Order. (T-VIII-75). At the same time petitioner requested an evidentiary hearing as to prosecutorial misconduct associated with the Brady material requested. (T-VIII-54). The District Court examined two witnesses and conducted an in-camera inspection of certain government memoranda and notes and ruled that no Brady material was involved. (T-VIII-56-72, 261).

On November 30, 1983 the jury returned a verdict of guilty as to petitioner on Counts I and II. (R399). On December 8, 1983, Mr. Marty filed a Motion for New Trial (R410, 412), which was denied on January 13, 1984. (R510). Judgment was

entered, and petitioner was sentenced to eight years imprisonment on Count I and five years on Count II, sentences to run concurrently. (R499).

B. Statement of Facts

This case grows out of an undercover drug investigation known as Operation Screamer conducted by the Drug Enforcement Administration. (T-I-80). From November 1981 through March 1982, petitioner attended several meetings with individuals involved in Operation Screamer, including undercover Special Agents Besley and Gardner. (T-VIII-40).

During and after the time of the above meetings, petitioner was operating under the code name Cid Able as a confidential informant for the United States Customs Service. (T-IX-124, 126, 136, 137, 139, 140, 142, 150). Indeed, at or near this time, petitioner served as a confidential

informant for certain other federal agencies, including the Central Intelligence Agency.

Petitioner was indicted on March 17, 1983 and arrested on March 23, 1983. (T-VIII-40). On August 18, 1983 a meeting took place at the office of the United States Attorney for the Southern District of Florida which petitioner attended. (T-VIII-46, 69). Petitioner's counsel, Alexamder Martone, did not attend and did not know of the meeting. (T-VIII-58). Petitioner states that the reason he did not discuss the meeting with his counsel was at the request of C.I.A. Agent John Mayfair (T-VIII-58, 59) and on the assurance of the United States that the case would be dismissed. (T-VIII-58,59,66). Government witnesses agree that such a meeting did take place, that the purpose of the meeting was to discuss the conspi-

racy charge against petitioner and that persons present at the meeting included petitioner, the Assistant United States Attorney then assigned to the case, three D.E.A. agents and an attorney named Newman. (T-VIII-69, 70).

The United States says that Mr. Newman represented petitioner at the meeting. Petitioner states that this was not the case, that he had never met Mr. Newman prior to the meeting and did not see him again afterward. Petitioner did tender $2,500 to Mr. Newman; however, the money was given to petitioner by C.I.A. Agent Mayfair, who arranged for Mr. Newman's presence at the meeting. (T-VIII-57, 58). Petitioner states that certain letters were produced at the meeting which, if provided to the defense, would tend to exculpate petitioner by supporting his defense that he was work-

ing for the United States government. (T-VIII-75, 76).

C. Existence of Jurisdiction in the Court Below

Petitioner was convicted in the United States District Court for the Southern District of Florida for violation of 21 U.S.C. 841(a)(1), 952(a) and 960(a)(1). The case was reviewed by the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT ERRED IN NOT GRANTING PETITIONER'S MOTION FOR NEW TRIAL MADE ON THE GROUND THAT PROSECUTORIAL MISCONDUCT WAS SO PREJUDICIAL AS TO VIOLATE PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

It is fundamental that

> "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense."

United States Constitution, Sixth Amendment.

In the instant case, that right was interfered with by the prosecution in meeting with petitioner after his indictment and before his trial outside the presence of and without the knowledge of his counsel. Under the American Bar Association Code of Professional Responsibility, an attorney shall not communicate about the case "with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." Disciplinary Rule 7-104(A)(1). The Florida courts have determined that this Disciplinary Rule "applies equally to lawyers involved in the prosecution of

criminal cases as in civil cases." State v. Yatman, 320 So.2d 401, 403 (Fla. 4th DCA 1975). See also United States v. Cross, 638 F.2d 1375 (5th Cir. 1981).

This Court has held that the right to counsel, "fundamental to our system of justice is present to assure fairness in the adversary criminal process." United States v. Morrison, 449 U.S. 361, 364 (1981). When government intrusion occurs after indictment and before trial, the proper remedy can be a new trial. Id. at 365.

In order for a new trial to be necessary, the intrusion must have an adverse effect on counsel's effective representation or otherwise prejudice the defense. Id. As one court has said:

> "Prejudice can manifest itself in several ways...It...can result from the prosecution's use of confidential information pertaining to the defense

> plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial."

United States v. Irwin, 612 F.2d 1182, 1187 (9th Cir. 1980).

Here the influence which the prosecution exerted on petitioner destroyed his confidence in his attorney by convincing petitioner that the case would be dismissed and he should not communicate such information to his counsel of record.

Where a material issue of fact is raised which, if resolved in favor of defendant, would entitle him to relief, an evidentiary hearing is required. Irwin, supra, at 1187.

At a minimum, the trial court should conduct an in-camera inspection of all written memoranda in the prosecution's files. If it is learned thereby that

there was a prejudicial intrusion on or interference with petitioner's right to counsel, a new trial must be ordered. United States v. Zarzour, 432 F.2d 1 (5th Cir. 1970). Where this minimal investigation by the Court is absent, a reversal and remand will follow. Id. at 4.

The brief evidentiary hearing which the District Court conducted was not sufficient to address the extent of the damage produced by the government's interference with petitioner's relationship with his attorney. (T-VIII-52-75). The only two witnesses heard by the Court concerning the August 18, 1983 meeting were petitioner and one of the Special Agents present at the meeting. (T-VIII-56, 67). None of the other persons present at the meeting were requested to testify, despite the sensitive nature of the right alleged to have been violated.

Petitioner testified that Agent John Mayfair of the Central Intelligence Agency had told petitioner that the case against him would be taken care of and that he should not disclose the meeting to his attorney. (T-VIII-58, 59). Agent Mayfair had retained and paid for the services of Mr. Newman, an attorney whom petitioner did not know and had no connection with. (T-VIII-57, 58, 61).

Although it was a matter of record at that time that petitioner was represented by Alexander Martone, and Mr. Newman questioned the appropriateness of being at the meeting, the assigned Assistant United States Attorney approved Mr. Newman's being there. (T-VIII-61). Petitioner further testified that he attended the meeting because of his impression that the case would be dropped if he furnished

D.E.A. agents with additional information. (T-VIII-59).

By his testimony, petitioner raised at least a rebuttable presumption that he had been prejudiced by prosecutorial misconduct. As this Court has said,

> "... once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."

Brewer v. Williams, 430 U.S. 387, 401 (1977). See also Massiah v. United States, 377 U.S. 201 (1964). Yet the prosecution ignored petitioner's right to counsel of his choice on August 18, 1983. It is clear that here the conduct of government agents "apparently approved by the United States Attorney, represents a grossly improper breach of [petitioner's] relationship with his trial counsel." United States v. Cross, 638 F.2d 1375, 1379 (5th Cir. 1981).

In the absence of an adequate eviden-

tiary hearing or in-camera review by the trial court, the fact that the prosecutorial misconduct may have seriously prejudiced petitioner mandates a new trial. See United States v. Taylor, 648 F.2d 565 (9th Cir. 1981).

II.

THE DISTRICT COURT ERRED IN NOT GRANTING PETITIONER'S MOTION FOR NEW TRIAL MADE ON THE GROUND OF THE PROSECUTION'S FAILURE TO DISCLOSE TO PETITIONER EXCULPATORY MATERIAL EVEN AFTER A SPECIFIC REQUEST HAD BEEN MADE.

Petitioner states that certain letters from the Central Intelligence Agency are included within the prosecution's files, letters which are supportive of petitioner's claim that he was a confidential informant for several federal agencies and

that such confidential informant activities were responsible for his participation in the alleged conspiracy. Under the District Court's Standing Discovery Order, the prosecution was obligated to turn over such letters to petitioner. When such production was not forthcoming, and when petitioner, on the day set for trial, first informed his attorney of the existence of the letters, a specific request was made to the prosecution for the letters. When they were not produced, petitioner sought the aid of the Court.

It was at the August 18, 1983 meeting discussed previously herein that petitioner was made aware of the C.I.A. letters in the government's file. The existence of the letters was not initially discussed by petitioner with his attorney for the same reason the fact of the meeting itself was

not discussed: petitioner was led to believe by the government that the case would be dismissed based on his cooperation and the nature of his involvement as a federal confidential informant. (T-VIII-58, 59, 66).

The District Court's determination as to whether these letters or any other exculpatory material existed consisted of an in-camera review of a memorandum prepared by government agent James W. Preacher and diary notes of government agent Randy Besley. The Court conducted a brief inspection of these documents and determined that the prosecution's files did not contain any exculpatory material. The Court then sealed said documents and marked them as Court's Exhibit 12. No other inquiry was made by the Court. (T-VIII-261, 262).

The District Court abused its discretion here, as well as with regard

to the allegations of prosecutorial interference with the attorney-client relationship. Here the Court should have conducted a more thorough investigation into the matter of the C.I.A. letters. Considering the surrounding circumstances of the August 18, 1983 meeting in the United States Attorney's office, a more detailed inquiry was required. Such inquiry should have required the testimony of all persons present at the meeting. At a minimum, affidavits should have been obtained from all present, and an in-camera inspection carried out of all relevant prosecution files. In-camera inspection is an appropriate method of dealing with Brady contentions, United States v. Ross, 511 F.2d 757 (5th Cir. 1975); however, this case demands a more detailed inquiry than was conducted here.

The District Court's in-camera

inspection fails to satisfy the character of Brady as "a rule of fairness and minimum prosecutorial obligation." United States v. Winner, 641 F.2d 825, 833 (10th Cir. 1981); United States v. Beasley, 576 F. 2d 626, 630 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979). Further inquiry should have been made by the District Court.

Under the Brady doctrine, a new trial is required when the prosecution has withheld exculpatory information from the defense which "might have affected the outcome of the trial." United States v. Agurs, 427 U.S. 97, 104 (1976). See also to the same effect United States v. Irwin, 661 F.2d 1063 (5th Cir. 1981). As this Court also said,

> "When the prosecutor receives a specific and relevant request, the failure to make any response is

seldom, if ever, excusable."

Agurs, supra at 106.

Where suppressed evidence is material to the defense, the good faith or bad faith of the prosecutor is irrelevant. Brady, supra.

CONCLUSION

For the foregoing reasons, it is urged that petitioner's conviction was contrary to fundamental fairness and due process of law and that therefore it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-5037

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIM PETTIT, ANTHONY GERBINA, a/k/a "TONI", JAMES CANNIN, JAMES BOY, CHARLES MARTY, a/k/a/ "CHARLES MARTIN", a/k/a "CHARLES MARTI", a/k/a "CHUCK", THOMAS ANDERSON, ARMANDO EVORA,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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July 17, 1985)

Before HENDERSON and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

Jim Pettit, Anthony Gerbino, James Cannin, James Boy, Charles Marty, Thomas Anderson and Armando Evora were convicted in the United States District Court for the Southern District of Florida for violations of 21 U.S.C. 841(a)(1), 846, 952, 963 and 18 U.S.C. 2. On appeal, the appellants collectively and individually allege numerous errors in the trial. Finding that all these assignments of error lack merit, we affirm the convictions.

This appeal grows out of an extensive undercover investigation in south Florida by agents of the Drug Enforcement Administration (DEA) beginning in the early part of 1981 and known as "Operation Screamer." The investigation culminated in March of 1983 with the return of fourteen indictments. The purpose of these investigations was to infiltrate groups in south Florida which were engaged in smuggling drugs into

this country by aircraft. The appellants were part of a larger group of twenty-seven involved in one particular operation whose goal was to import marijuana from Colombia.

We have reviewed the record and the applicable law and conclude that there were no errors of consequence during the trial to warrant the reversal of the district court's judgment. However, two of the claims merit discussion.

Boy urges that the district court erred in refusing to question the jury concerning certain newspaper articles published during the three-week trial in Fort Lauderdale, Florida. The basis of this complaint is the constitutional right to a fair trial. In determining whether publicity rises to the level of a constitutional violation one of two standards must be applied to the facts of each case:

"presumed prejudice" or "actual prejudice." With respect to federal court trials, we will presume prejudice in two situations. Williams v. Griswald, 743 F.2d 1533, 1537-38 (11th Cir. 1984). Publicity may be so intense and extensive, both before and during trial, as to render the proceedings a "media circus." E.g., Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Boy does not identify any pretrial publicity.

Alternately, there may be information derived from outside sources which is so highly prejudicial that jurors reading or hearing it would be unable to render a verdict based solely on the evidence presented in court. E.g., Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959) (defendant's criminal record); United States v. Williams, 568 F.2d 464

(5th Cir. 1978) (defendant's conviction after prior trial on same charge). Boy submits copies of five newspaper articles to support his contentions here, three appearing after the first day of trial and two a week later. The earlier articles included some supplemental information arguably prejudicial to the defendant. These stories referred to the overall results achieved by "Operation Screamer." The Miami Herald reported, "The probe touched 20 states, saw the seizure of 42,000 pounds of marijuana, 1.2 million methaqualone (Quaalude) tablets, 200 pounds of opium and four airplanes and resulted, in March, in the naming of 84 persons in 14 indictments." Court Exhibit 1. Both the Herald and the Miami Sun-Sentinel also noted that of the 26 others in Boy's indictment, nine had already pled guilty and eight were fugitives. Id., Court Exhibit 2. The Herald referred to Boy as

the "most prominent" of the defendants on trial because, as evidence at the trial confirmed, he was the multimillionaire owner of a widely known aircraft leasing business.

One week into the trial, both the Sun-Sentinel and the Fort Lauderdale News ran an article recounting the evidence introduced by the government. The story stated in part:

> [Boy] is charged with conspiring with smugglers from June 1982 until early 1983. He also has been named in a second indictment for allegedly selling a plane to [DEA agent] Besley, who was impersonating a drug smuggler.
>
> ...
>
> In testimony later ruled inadmissible by [Judge] Gonzalez, who said it wasn't relevant to this case, Besley said he first met Boy in March 1982 at Carolina Aircraft's offices.
>
> The meeting was to consummate a $156,000 plane purchase, Besley said, with the two of them discussing ways to hide Besley's ownership in the air-

> craft in registration forms they completed.
>
> "We had a chuckle about me signing my name as Roberto Diaz," Besley said.

Court Exhibits 5, 7. However, Boy himself gave similar testimony about his March, 1982 meeting with the agent. R. Vol. 11 pp. 191-207, 221, 228-34. The bulk of the article merely reported additional evidence presented at the trial.

We cannot presume that prejudice resulted from publication of these five articles. Neither the scope of Operation Screamer, nor the fact that some of the 26 persons indicted with Boy had fled or pled guilty, would prevent the jury from focusing on the admitted evidence in making a determination of Boy's guilt or innocence. The proof during the trial was overwhelming, and the defendant himself corroborated many

parts of the government's case. In applying the actual prejudice standard, we observe that Boy does not point to any evidence that the published stories adversely influenced the jury's verdict. Moreover, the district court carefully instructed the jurors after each court session to refrain from reading or listening to anything concerning the case. Without more, we cannot assume that the jurors ignored these instructions. Under these circumstances, we conclude that the district judge did not abuse his discretion by refusing to question the jurors about the articles.

The other challenge requiring further comment centers on Pettit's charge that the government improperly referred to his failure to testify. This purported improper reference arises from the testimony rather than the prosecutor's argument, as

is the usual case. In the hope of demonstrating that Petit had withdrawn from part of the overall importation conspiracy, Petit's lawyer, Kathy Hamilton, cross-examined DEA agent Randy Besley at length. Hamilton, trying to prove that during the time in question Petit was no longer trusted by the ringleader of the conspiracy, and hence that he was no longer a participant in the scheme, asked, "Isn't it a fact that Mr. Cruz no longer trusted Jim Pettit?" Besley replied, "I don't know, you would have to ask Mr. Cruz." R. Vol. 6 p. 144. Hamilton then sought to prove Petit had attempted to withdraw by objecting repeatedly to various details of the importation plan. Hamilton asked, "Isn't it a fact that Mr. Pettit was trying to back out of this trip at the last minute?" Besley replied, "I don't know, you'll have

to ask him." Id. pp. 146-47.

Besley was not only the prosecution's chief witness but also a DEA agent, duty-bound to detect and help convict drug smugglers. Although there are few cases concerning references to a defendant's silence made by someone other than a prosecutor, we readily conclude that Besley's remarks were subject to the same constitutional constraints as those of a prosecutor.

In order to sustain a charge of improper reference to the silence of a defendant, he must show either that the remark was intended as such or that, under all the circumstances, the jury would naturally and necessarily construe it as such a comment. E.g., United States v. Harbin, 601 F.2d 773, 777 (5th Cir. 1979). Pettit has failed in both instances. A careful reading of the

lengthy cross-examination discloses that Besley's answer was nearly identical to one he had given earlier when asked about Cruz' state of mind. The earlier answer could not possibly have been intended as an improper comment because Cruz was a witness for the government. Besley's answer when asked a moment later about Pettit's state of mind is understandably similar.

Nor would the jury necessarily have perceived Besley's response as a comment on Pettit's silence. Given that the remark was made not in an argumentative fashion but neutrally and constituted a reasonable answer to the question posed by Pettit's counsel about the state of mind of another person, Pettit faced a heavy burden in trying to prove that the reply was inherently damaging. Even his own lawyer admitted that she did not then

perceive the answer as a comment on his silence. R. Vol. 6 p. 171-72.

The judgments of conviction are AFFIRMED.

App. 13

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-5037

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIM PETTIT,

ANTHONY GERBINO a/k/a "TONI",

JAMES CANNIN,

JAMES BOY,

CHARLES MARTY, a/k/a "CHARLES MARTIN":

a/k/a "CHARLES MARTI"; a/k/a "CHUCK",

THOMAS ANDERSON,

ARMANDO EVORA,

Defendants-Appellants.

Appeal from the United States

District Court for the

Southern District of Florida

ON PETITION FOR REHEARING

AUG 28 1985

Before HENDERSON, CLARK and TUTTLE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing / APPELLANT MARTY / filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

s/Albert J. Henderson
United States Circuit Judge